IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 147 OF 2001.

1. Mr. Pedro Vincente
de Souza, alias Pedru
Vicent D'Souza, major.

2. Mrs. Lily Godinho E.
De Souza, major, both
r/o H. No.522, Vagator,
Anjuna, Bardez, Goa. ... Appellants.

VERSUS

1. Mr. Ferminiano Salvador
de Souza alias Salvador
Agustino D'Souza, major,
presently unemployed.

2. Mrs. Anna Francisca
Fernandes e de Souza,
major, housemaid,
both r/o Anjuna, Bardez,
Goa. Presently
residing at Khar, Mumbai-52. ... Respondents.

Mr. Sudin M.S. Usgaonkar, Advocate for the Appellants.

Mr. N.N. Sardessai, Advocate for the Respondents.

CORAM: N.N. MHATRE &
P.V. HARDAS, JJ.

DATE: 4TH FEBRUARY, 2004.

J U D G M E N T: (PER HARDAS, J.)

This appeal has been filed at the instance of the original defendants, who challenge the judgment and decree, passed by the First Addl. Civil Judge Senior Division at Mapusa, dated 27th April, 2001 in Special Civil Suit No.151/96/Sr/I.

2. The respondents/original plaintiffs had filed the aforesaid Civil Suit praying for a declaration that the Deed of Partition dated 9.3.94 be declared as fraudulent, null and void with no legal effect and bad in law. They also prayed for cancellation of the said document. Prayer was also to the effect that the suit property be partitioned and the plaintiffs be allotted their one half share in the suit property. The said suit came to be filed on the ground that by virtue of a Sale Deed dated 11.4.1962 the plaintiffs and the defendants together jointly in equal shares purchased the suit property. The plaintiffs were still in possession of the suit property and had their household articles in the house. They also plucked the fruits from the trees. On 4.3.94 the defendants proposed that there should be a partition by metes and bounds and on 8.3.94 the defendants informed the plaintiffs to come to the office of the Sub-Registrar on 9.3.94 to register the Deed of Partition. The plaintiffs were not given an opportunity to peruse the Deed of Partition and were informed by the defendants that the property is divided into two equal halves. The plaintiffs being illiterate, it was necessary for them to get the Deed explained through someone. When the plaintiffs made a feeble attempt before the Registrar, the defendants pressurised the plaintiffs saying that the

Sub-Registrar would be able to give them only 10 to 15 minutes to register the Deed and if the Deed was not registered, they will again have to come. The defendants had also stated that if the plaintiffs do not oblige, the defendants would only permit the plaintiffs to enter the suit property. The defendants had informed the plaintiffs that after registration a copy of the Deed would be sent to the plaintiffs at their address. The plaint had averred that the defendants by practising fraud had obtained the said Deed of Partition from the plaintiffs. After issuance of a legal notice, the said suit came to be filed.

3. The defendants, in the written statement, denied the case of the plaintiffs and stated that it was the plaintiffs who proposed to divide the property and requested the defendants to allot an area of 400 sq.m. to the plaintiffs. Accordingly the defendants along with the plaintiff no.1 contacted one Advocate D'Mello to draw the Deed. The plaintiff No.1 had paid the amount for the stamp papers and had also paid the legal fees. The Partition Deed was read by both the plaintiff no.1 and the defendants and the contents of the Deed were also explained to them by Advocate D'Mello. It was also stated that the suit property had been purchased

from out of his own funds by the defendant and the plaintiff no.1 being unemployed, had not contributed anything towards the purchase. It was because of the insistence of the mother of defendant No.1 and the plaintiff No.1 that the names of the plaintiff and Defendant No.1 were shown as joint co-owners.

4. On the basis of the pleadings of the parties, the learned Trial Court framed the following Issues:-

1. Whether the plaintiffs prove that the suit property was purchased jointly in equal shares by the plaintiffs and the defendants by Sale Deed dated 11.4.1962 ? Affirmative.

2. Whether the plaintiffs prove that they are in common possession and enjoyment of the suit property alongwith the defendants ? Affirmative.

3. Whether the plaintiffs prove that Deed of Partition dated 9.3.1994 is fraudulent, null and void and bad in law and proves that they are entitled for half share in property ? Affirmative.

4. Whether the defendants prove that the suit is barred by limitation ? Negative.

5. Whether the defendants prove that the plaintiff No.1 did not pay or contribute any amount towards the purchase price of the suit property ? Negative.

6. What relief? What order? As per order.

5. Plaintiff No.2 examined herself as P.W.1. She has stated that the defendant No.1 is her brother-in-law being the brother of plaintiff No.1. The suit property has an area of 2000 sq.metres and was jointly purchased by plaintiff and defendant No.1 in 1962 by a registered Sale Deed. Both the plaintiff No.1 and the Defendant No.1 have jointly contributed in equal shares for the purchase of the property. According to her, her household articles have been kept in the house and the plaintiffs are plucking the fruits from the trees whenever they come to Goa. On 4.3.94 the defendants had proposed that the property may be divided in equal shares in the interest of both the parties. The plaintiffs agreed with the said proposal. On 8.3.94 the defendants informed the plaintiffs to remain present in the office of the Sub-Registrar of Mapusa on the next day for executing the document concerning partition. The plaintiffs insisted on seeing the document in order to know the contents. The defendants told the

plaintiffs that there was nothing to worry and half share of the property would be given to the plaintiffs. On 9.3.94 the plaintiffs again requested for seeing the papers but the defendant got annoyed and threatened the plaintiffs that he would not give them any share in the property and would prevent the plaintiffs from enjoying the suit property if they refused to sign the document. On account of the threats given by the defendant, the plaintiffs reluctantly signed the said document. After execution of the document, the plaintiffs were told to proceed to Bombay and a copy of the concerned document would be sent at their address. The defendants however did not sign any document though promised by them and in the month of October, 1995, plaintiffs received a letter from the Deputy Collector of Mapusa informing the plaintiffs that they had been allotted an area of 400 sq.m. and the balance area had been retained by the defendants. The said letter is a Exh.PW1/A Colly. The Sale Deed of 1962 is at Exh.PW.1/B Colly. Form I and XIV in respect of the suit property is at Exh.PW.1/C. The plaintiffs applied for a certified copy of the Partition Deed and they obtained the same on 15.12.95. According to P.W.1 the papers for preparing the documents were purchased by defendant no.1 and all other things were also done by defendant

no.1. The plaintiffs were never taken to any Advocate neither had they gone to any Advocate on their own. On 28.11.95 a notice was sent to the defendants and the said notice is at Exh.PW.1/A Colly. In the cross-examination on behalf of the defendants, P.W.1 admitted that she was married with the plaintiff No.1 in 1969. Plaintiff No.1 is younger to her by 11 years. She has also admitted that she is illiterate and also her husband,plaintiff No.1, is illiterate. She has admitted that she knows to sign her name. She has admitted that on the partition deed she had put her signature and not her thumb impression. She has also admitted that the property was purchased by her husband before her marriage. She has denied the suggestion that the houses and the huts have been constructed by defendant No.1. She has also denied the suggestion that the defendants had planted the jackfruit and other trees. She has denied the suggestion that the sale consideration for the purchase of the suit land was paid by the defendant No.1 only. She has also admitted in the cross-examination that the Partition Deed was presented in the office of the Sub-Registrar by defendant no.1. She denied the suggestion that the Deed was presented by the plaintiff no.1. She also denied the suggestion that the stamp paper was purchased by plaintiff No.1. She also denied the

suggestion that the plaintiffs had taken the initiative in preparing the Deed of Partition and had gone to Advocate D'Mello in connection with the same. She denied the suggestion that the Deed was read over to the plaintiffs by Advocate D'Mello.

6. On behalf of the defendants, the defendant no.1/appellant examined himself as a witness who states that he had purchased the suit property from out of his own funds. He had included the name of the plaintiff no.1 on the request of his mother and his mother had requested him to allot 300 sq.m. to the plaintiff No.1. D.W.1 further states that he had informed plaintiff no.1 that he had no right in the suit property. In the year 1994 the plaintiff no.1 requested the defendant No.1 to allot him 300 sq.m. of the suit land. Ultimately defendant No.1 agreed to give to plaintiff No.1 400 sq.m. The Deed of Partition was drafted by Advocate D'Mello and defendant No.1 was taken to the office of Advocate D'Mello by the plaintiff No.1. The Deed of Partition was read over to the parties. He further states that a false case has been filed by the plaintiffs. He has admitted that the Sale Deed of the suit property dated 11.4.1962 bears his thumb impression and of the plaintiff no.1 also as he was illiterate. He has stated that he had not purchased the stamp papers for

the Partition Deed and when he was confronted with the Partition Deed, which showed that the stamp papers had been purchased in his name. He has admitted that as per the Partition Deed an area of 1600 sq.m. was allotted to him and by an area of 400 sq.m. was allotted to the plaintiffs. The said Deed is at Exh.DW.1/P1. He has admitted that a plan was annexed to the Partition Deed, but the same was prepared by the plaintiffs. He has admitted that the Deed of Partition was typed in the office of the Advocate and from the office of the Advocate, the parties went to the Office of the Sub-Registrar. He has further admitted in cross-examination that he was asked how much he wanted to give to the plaintiff no.1 and had stated that 400 sq.m. be given to him. He has also admitted that it was the Advocate who asked him how much he was going to give to the plaintiff.

7. The defendants examined Lily D'Souza, original defendant No.2 as D.W.2. She states that in 1994 the plaintiff no.1 along with his son had come to her house and had told her husband to give him an area of 400 sq.m. instead of 300 sq.m. Her husband agreed to allot 400 sq.m. to the plaintiff. The plaintiff No.1 bought the stamp papers and took her husband (defendant No.1) to Advocate D'Mello. On the day of

registration of the document, the contents were explained by Advocate D'Mello to both the parties. According to her in 1995, the plaintiffs along with the labourers had come to the property and had cut the trees. Advocate D'Mello had sent a letter calling them in his office. Thereafter the persons accompanying the plaintiffs had fixed the boundary stones as per the plan annexed to the Deed of Partition. In the cross-examination she has stated that she had gone to Advocate D'Mello with the Deed of Partition to confirm whether the said Deed reflected the true position as per the instructions given by them to Advocate D'Mello.

8. Defendants also examined Advocate Anthony D'Mello as D.W.3. According to him plaintiff No.1 had come to his office for partitioning of property. Plaintiff no.1 had brought the necessary documents and on perusal of the Sale Deed found that the plaintiff No.1 and the defendant No.1 had equal shares in the property. According to him plaintiff No.1 told him that though he was shown as joint and equal shareholder, the entire consideration towards the purchase of the property was paid by defendant No.1 as plaintiff No.1 was not employed during the relevant period. The plaintiff No.1 further told him that it was mutually agreed that an area of 300 sq.m.

should be allotted to him. He informed plaintiff No.1 that as per the Sale Deed he was entitled for half of the property. However, the plaintiff told him that he would accept an area of 400 sq.m. Advocate D'Mello further states that he drafted the Deed of Partition and the cost of the stamp papers was paid by plaintiff No.1 to him and one of his staff members had purchased the stamp papers. Since the plaintiff No.1 insisted that stamp papers be purchased in the name of defendant No.1, the stamp papers came to be purchased in the name of defendant No.1. After drafting the Deed of Partition it was read over to both the parties and a copy was given to the plaintiff No.2 and thereafter the parties went to the office of the Sub-Registrar. The Deed was presented for registration by plaintiff No.2. The parties signed the said Deed and the plaintiff No.2 collected the documents. He further states that the plaintiffs had come to his office and they had informed him that they had gone to the property and were obstructed by the defendants and so he had sent a letter to the defendant No.1 calling him in his office. The defendants attended his office and the defendants informed him that the plaintiffs were cutting trees from the portion which was allotted to the defendants. He accordingly advised them to settle the matter amicably.

9. D.W.3 Advocate D'Mello does not appear to us to be a reliable witness and according to him the plaintiff No.1 had come to his office and had stated that he had not contributed anything for the purchase of the suit house as the plaintiff No.1 was unemployed. The defendant No.1 in his examination-in-chief has admitted that at the relevant time his brother (plaintiff No.1) was serving at Bombay. Even otherwise, since plaintiff no.1 had admittedly half share in the property, it is incomprehensible as to why he would contact Advocate D'Mello to state that since he had not contributed anything for the purchase of the suit house, a partition deed be drawn, allotting him only 300 sq.m. According to D.W.3 the plaintiff No.1 then suggested 400 sq.m. According to the evidence of the defendants, the plaintiff approached them on his own and requested that 300 sq.m. be allotted to him and thereafter requested for 400 sq.m. be allotted to him. That the plaintiff no.1 would contribute for the stamp papers and insist that the stamp papers be purchased in the name of defendant No.1 being being the elder brother also tasks human credulity for its acceptance. D.W.3 Advocate D'Mello has admitted in cross-examination that no one had informed him about any conflict between the parties and yet the Deed of Partition recites that in order to settle the

conflict, this Deed of Partition is being executed. Therefore the case of the defendants that the plaintiff on his own approached the defendants and initiated the drafting of the Partition Deed by agreeing to accept only 400 sq.m. though he had a right for half share, is unbelievable. The plaintiffs" case has not been shown to be false either by the cross-examination by the defendants or by the defendants in their testimony. The learned Trial Court, on appreciation of the evidence has decreed the suit, though it appears that the learned Trial Court has not given adequate reasons for the same. With the assistance of the learned counsel for the parties we have therefore perused the evidence and we find that the plaintiffs have been able to establish that the Deed of Partition had been executed without the contents of the same being appraised to them.

10. Mr. Sudin Usgaonkar, learned advocate appearing on behalf of the appellants/original defendants has urged before us that a sketch map was appended to the Deed of Partition and the sketch map is signed by the plaintiffs. The sketch clearly shows the division of the property. While signing the said sketch the plaintiffs ought to have noticed that the property is not equally divided and thus

their case that they were unaware of the contents is falsified. According to Mr. Usgaonkar, the plaintiffs ought to have exercised due diligence and if they have exercised due diligence, the fraud could have been detected. For this purpose, the learned counsel for the appellants has placed reliance on the judgment of the Supreme Court in the case of Shri **Krishnan v. The Kurukshetra University, Kurukshetra,** reported in A.I.R. 1976 S.C., 376. In this case the Apex Court had observed that the appellant had submitted his form which was forwarded by the Head of Department in December in the preceding year when the examination was held. The Apex Court further held that during the period of 4 to 5 months it was the duty of the University authorities to scrutinise the form to find out whether it was in order. If neither the Head of Department nor the University authorities took care to scrutinise the admission form, the question of the appellant committing a fraud did not arise. According to the Supreme Court it was not a case of suggestio falsi, or suppressio veri. The Supreme Court found that the University authorities acquiesced in the infirmities which the admission form contained and allowed the appellant to appear in Part I Examination. The facts of the reported case according to us are wholly inapplicable to the facts of the present case.

11. For the reasons stated above, we see no merit in the Appeal and the same is dismissed with no order as to costs.

NISHITA MHATRE, J.

P.V. HARDAS, J.

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